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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

PETITION FOR RECONSIDERATION

Respectfully submitted,

MAIN STREET BROADCASTING COMPANY INCORPORATED

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SUMMARY

In Greek mythology, Procrustes had a bed that, he claimed, would fit everyone In order to reconcile this claim with reality, any guest who was too tall would have his feet chopped off, while the short visitor would be stretched to fit the bed. The Commission's decision to adopt the Arbitron Metro Survey Area for the purpose of evaluating compliance with the Multiple Ownership Rules is a similarly disastrous one-size-fits-all effort

The Commission's adoption of an Arbitron-defined market is defective on at least four counts. First, whereas the FCC is charged with regulating in the public interest and is accessible to all interested parties, Arbitron carries only a profit incentive to be responsive to its subscribers. (Moreover, as a monopoly, its incentive to respond to *anyone* is less pronounced.) Because the goals of Arbitron and the FCC are not identical, the reliability of the Arbitron definition for FCC purposes is suspect. Indeed, relying on Arbitron yields arbitrary and capricious results

In addition, the FCC may not surrender to a private entity its responsibility to regulate spectrum pursuant to the public interest. Often, stations included in a market by Artibron do not actually compete for listeners with a station that is the subject of a proposed transaction. In such instances, parties must be allowed to overcome any presumption in favor of the Arbitron-defined market Without clarification from the FCC on this point, the new market definition unlawfully delegates the Commission's responsibilities to a private entity

Furthermore, the FCC failed to consider Main Street's arguments *against* undue

reliance on the Arbitron MSA to evaluate compliance with the Multiple Ownership Rules. Use of a market definition derived solely from the Arbitron MSA retains all of the defects of an inflexible approach under the *previous* market definition, and adds new defects as well.

Finally, noncommercial stations may contribute to diversity of viewpoints in a market, but by definition they do not compete economically for advertisers. Thus, the FCC's decision to count noncommercial radio stations as if they compete for advertisers with for-profit licensees flies in the face of the Commission's own regulatory scheme.

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Main Street Broadcasting Company Incorporated ("Main Street"), by counsel, hereby petitions the Commission to reconsider aspects of the definition of radio markets adopted in the *Report and Order and Notice of Proposed Rulemaking*, FCC 03-127, released July 2, 2003 (hereinafter "*Order*"). In the *Order*, the Commission concluded that it would no longer evaluate compliance with the Multiple Ownership Rules by relying on radio signal propagation contours to define the relevant market. Instead, the Arbitron Metro Survey Area ("MSA") will replace overlapping contours as the "presumptive" market relevant to a proposed transaction. *Order* at 274. The Commission also decided that noncommercial radio stations would be counted as competitors in the local radio market.

Main Street is the licensee of a single FM radio station: WLNG, Sag Harbor, New York. WLNG and a small set of Class A (6 kW) stations compete against each other in the small but heavily-consolidated market of Eastern Long Island, otherwise known as the Hamptons Arbitron includes this market in a much larger geographic grouping known as the "Nassau Suffolk" MSA. Main Street can therefore testify to the aberrant results of any policy that would arbitrarily peg all market definitions to the Arbitron MSA. Indeed, on March 27, 2002 Main Street submitted *Comments* in the above-captioned proceedings illustrating this point. These *Comments* should have informed the Commission's deliberations to the extent of persuading the FCC against a rule automatically relying on the Arbitron MSA. Likewise, Main Street's experience as a commercial broadcaster contradicts any notion that noncommercial stations compete with their for-profit counterparts in the manner contemplated by Congress in fashioning the numerical radio ownership limits. Main Street hereby amplifies the defects it identified previously and elaborates on them. As explained below, the Commission should reconsider its adoption of the Arbitron MSA to define local radio markets and either (1) reinstate the previous market definition, or (2) clarify that an "actual presence" test will trump any presumption in favor of the Arbitron MSA. Furthermore, the Commission should reconsider the treatment of noncommercial stations as competitors in local radio markets.

* * *

A. FCC Use of Arbitron-Defined Markets is Contrary to the Public Interest.

Relying on the Arbitron MSA to evaluate compliance with the Multiple Ownership Rules suffers from at least four fatal flaws. First, using the Arbitron MSA as a presumptive definition of the local radio market for FCC purposes produces arbitrary and capricious results. Second, depending on the Arbitron MSA necessarily neglects the FCC's obligation to regulate broadcasters in a manner consistent with the public interest and instead unlawfully delegates the Commission's responsibilities to a private entity. Third, the FCC failed to consider Main Street's arguments *against* undue reliance on the Arbitron MSA to evaluate compliance with the Multiple Ownership Rules. Fourth, the adoption of a market definition derived solely from the Arbitron MSA retains all of the defects, identified by Main Street, in an inflexible application of the *previous* market definition, and adds new defects as well

I. Using the Arbitron MSA produces arbitrary and capricious results.

The goal of the FCC's Multiple Ownership Rules has long been "to promote competition and viewpoint diversity within local radio markets." Biennial Review Report, *1998 Biennial Regulatory Review*, 15 FCC Rcd 11058, ¶52 (2000). Strict compliance with the Rules may produce "unintended results that are contrary to Congress' intent" if the methodology employed is inconsistent with "a rational definition of radio 'market' that reflects the number of stations to which listeners in a particular market actually have access." *1998 Biennial Regulatory Review, supra*, at ¶ 64-65 The Rules were designed to reflect "the actual options available to listeners and market conditions facing the particular stations in question." *Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596 (1993). Thus, the FCC's Multiple Ownership Rules should rely on a radio market definition precisely to establish where listeners and advertisers confront essentially identical choices, so as to ensure that listeners and advertisers have a minimum threshold number of competing options.

One can easily discern how the conflicting, distinct purposes of Arbitron and the FCC would militate against reliance on the Arbitron MSA to measure compliance with the Multiple Ownership Rules. The public interest in competition and diversity, as opposed to advertisers' interest in paying rational rates, is achieved only if the geographic area is defined as a result of an analysis that predicts the *actual presence* of every station in a market *relevant to a proposed transaction*.

Arbitron, however, cares not a fig about the public interest or the actual presence of stations in the precise geographic market relevant to a proposed transaction. Rather, Arbitron is interested in selling to broadcasters and advertisers in a geographic region subscriptions to a very expensive service that purports to reflect audience share within that geographic region. Arbitron's customers have not historically concerned themselves with the number of stations in a market, *i e* , where the same consumers were faced with the same choices. Instead, Arbitron's customers care only for data that can be construed as showing that a given station or group reaches a maximum number of listeners in a region that will not prove a stumbling block to the decision to buy time

The FCC now plans to begin with a geographic area as defined by Arbitron instead of ending with a geographic area as defined by evidence or predictions of an actual presence by every included station. In doing so, the FCC has placed the cart before the horse. As a result, the Commission would now ignore the fact that large regions within a given MSA may not receive the signals of those stations that Arbitron has included in the market. Relying on a methodology so poorly matched to the logical framework of the Rules is certain to produce arbitrary and capricious results.

In view of the flaws in the Arbitron-defined market for FCC multiple ownership purposes, perhaps the most troubling aspect of the *Order* is its failure to provide any guidance with respect to just how hard and fast the agency has established the "presumptive" Arbitron market definition as the measure of the relevant market. Can this presumption be overcome in theory and in practice? Under the previous standard, the Commission had a history of exercising discretion where evidence that a given station had no actual competitive presence in a market rebutted anomalous results that would flow from a less flexible approach. Under the new methodology, precisely what standard, if any, will be used to determine whether the evidence is sufficient to overcome the presumption in favor of the Arbitron market? The *Order's* silence on these questions suggests that the Arbitron definition was adopted for want of an easy alternative. The *Order* betrays a lack of careful deliberation in the public interest to support the conclusion that an Arbitron definition would constitute an improvement over the old one.

In order to avoid an arbitrary and capricious outcome, any presumption must, both in theory and in practice, permit a party to overcome the presumption with evidence that the Arbitron MSA does not reflect the actual choices available to actual people. At a minimum, the FCC should clarify that it retains the discretion – and responsibility -- to recognize evidence that a station or stations that Arbitron may treat as "in" a given MSA does not have an actual presence in the smaller area that is served by stations involved in a particular proposed transaction In short, an "actual presence" test must trump any presumption in favor of the Arbitron MSA.

To date, the FCC had relied on the coverage contours of the stations involved in a given transaction. That is the best starting place for determining whether a station is actually present in a market The market area served by the typical Class C facility is on the order of *twenty times* as large as that reached by a Class A station. In the Nassau-Suffolk MSA discussed in Main Street's *Comments*, the higher powered Class B stations do not reach the east end of Long Island, where listeners and advertisers rely on the set of local FM stations identified by the former contour overlap method as market participants. What should logically be a separate "market" for purposes of FCC analysis is not, because Main Street has found that it cannot afford Arbitron's services. Main Street's largest competitor, AAA Entertainment (with five FM stations there!) would evidently prefer that advertisers be ignorant of Main Street's strong presence in the east end of Long Island. Thus, there is little marginal subscription revenue available to Arbitron from carving out a separate MSA that would reflect market realities In short, Arbitron's geographic boundaries may be convenient, but as a rule they are less accurate than a radio signal propagation standard at predicting stations' actual presence in a market.

II. Relying on Arbitron neglects the FCC's public interest obligation and unlawfully delegates power to a private entity.

The FCC responds to concerns about the unreliability of Arbitron MSAs as an indicator of the local radio market, in part, by describing Arbitron's ability to adapt its market definition *Order* at 277 At the same time, the FCC is adopting a two-year delay in its recognition of the effect of Arbitron's changes in order to keep Arbitron's admitted adaptability from being used to manipulate the Rules and win approval of otherwise suspect transactions. *Id* at 278 Obviously, it is difficult to reconcile these conflicting principles. It is simply impossible to provide for timely changes in market definitions, while imposing a two-year lag before changes become effective.

Even more troubling is the FCC's apparent complete surrendering of its own role as guardian of the public interest to a private entity, and a private monopoly at that. In contrast to the FCC's mandate to consider comments from all interested parties, Arbitron's adaptability is restricted to those who subscribe to its service. In short, smaller broadcasters that cannot afford to subscribe to Arbitron's service are essentially disenfranchised by the new dependence on Arbitron-defined markets. Arbitron certainly has no incentive to respond to the concerns of non-subscribers, even where (and, perhaps, *especially* where) such non-subscribers might be able to demonstrate that Arbitron's market definitions do not reflect the actual presence of stations in a market or a geographic area that makes sense under fundamental principles of economics.

Moreover, the FCC cannot delegate to Arbitron power that it does not have. Since the FCC has no power except for that which is delegated to it by Congress, the agency cannot delegate to Arbitron a role that Congress could not delegate directly. It is well established that Congress may not delegate its own power to a private entity such as Arbitron. *A L A Schecter Poultry Corp. v. U S*, 295 U.S. 495 (1935). To the extent that the FCC relies solely on Arbitron-defined markets to evaluate compliance with the FCC's Multiple Ownership Rules, the Order constitutes an unlawful delegation of federal power to a private entity

III. The Commission Failed to Consider the Inadequacy of Arbitron's Market Boundaries for FCC Purposes.

Remarkably, the *Order* does not speak to the substance of Main Street's Comments at all. Specifically, Main Street was one of the few commenters in this proceeding to demonstrate the inadequacy of reliance on radio markets as defined by Arbitron in some situations. Yet the Commission failed to consider Main Street's emphatic rejection of the notion that because geographic markets as drawn by Arbitron are used by some advertisers in some situations they are appropriate for FCC purposes

Main Street offered its own circumstances as an illustration of how inappropriate an Arbitron-defined market would be. The Arbitron Metro in which WLNG operates is the Nassau-Suffolk market. This vast area is more than a hundred miles long, far too large to be served by any single radio station Its heavily populated western sections (Nassau and Western Suffolk Counties) include over *two million people* who are not reached by the signals of WLNG or any of the other stations with which WLNG competes on the East End of Long Island. Conversely, none of the stations that serve Nassau County competes in the Hamptons, because none of them has any appreciable reliable signal there. Adoption of a market definition that turns a blind eye to the unrealistic nature of such Arbitron "markets" cannot be consistent with the public interest

IV. The new market definition retains all of the defects in an inflexible application of the previous market definition.

In its *Comments*, Main Street noted that an inflexible application of the old market definition could produce irrational results. *Comments* at 6-8. Many of these concerns were described in the *Order* as good cause for disposing of the old market definition entirely. As much as Main Street recognizes these problems with the old system, the solution adopted by the Commission amounts to elimination of baby along with bathwater.

As Main Street's *Comments* explained, the FCC enjoyed discretion to overlook contour overlap when the evidence reveals that stations were not actually present in the market relevant to a proposed transaction. In fact, the agency is obliged to exercise that discretion. *Comments* at 4-9 Unfortunately, as noted above, the *Order* provides no guidance as to how an applicant or petitioner may overcome the presumption in favor of an Arbitron MSA In the name of improving on the previous methodology, the Commission may have made matters considerably worse

In the event that the Commission remains determined to adopt the Arbitron MSA as the measure of the relevant geographic market, the FCC should provide the missing guidance as to how the presumption in favor of Arbitron-defined markets can be overcome. At a minimum, the agency should clarify that the presumption will be overcome by evidence that stations included in a market by Arbitron do not actually compete for listeners with the stations involved in a proposed assignment or transfer.

B. Noncommercial Stations do not Compete With Commercial Stations.

Finally, it is oxymoronic to count noncommercial stations as competitors of commercial licensees. Commercial stations compete with each other for advertisers, whereas noncommercial operators do not. While noncommercial licensees may contribute to the diversity of viewpoints available in a market, they are irrelevant to any analysis of economic competition. "Underwriting announcements" should only be allowed to a point short of where they would compromise the fundamental noncommercial nature of operations in the reserved band. That point is also short of where non-commercial stations can be considered full market participants for purposes of the multiple ownership rules.

A market might theoretically support five noncommercial stations, but if only one party controls all of the commercial stations on which advertisers may advertise, that sole commercial operator enjoys a monopoly. It therefore makes no sense to evaluate the competitive conditions in a market by treating noncommercial stations as relevant to the numerator or denominator relevant to the statutory numerical limits. This is especially significant in light of the fact that the multiple ownership rules do not apply to noncommercial stations. What the Commission might count as five antagonistic voices today for purposes of the denominator in a transaction in the commercial band may next year be just one voice.

Accordingly, the Commission should exclude noncommercial stations when evaluating compliance with the Multiple Ownership Rules.

CONCLUSION

In view of the foregoing, the Commission should reconsider its adoption of the Arbitron MSA as a means of measuring compliance with the Multiple Ownership Rules. The FCC should either retain the previous market definition and the discretion that historically accompanied it, or clarify that any presumption in favor of the new market definition will be overcome by an actual presence test. Furthermore, the Commission should exclude noncommercial stations from the count of stations that actually compete for advertising revenue with commercial licensees for advertising revenue.

Respectfully submitted,

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